Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of

IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996

CC Docket No. 96-98

COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS RESELLERS ASSOCIATION

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SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 450 resale carriers and their underlying product and service suppliers, submits the following recommendations for consideration by the Commission in the captioned rulemaking proceeding:

- The best, and perhaps the only, way to achieve the pro-competitive intent of the '96 Act is for the Commission to take an aggressive, proactive role and to adopt not only a uniform, pro-competitive national policy framework, but highly detailed implementing rules and regulations. Certainly, the States have a critical role to play in bringing competition to the local exchange/exchange access market, but the foundation must be laid by the Commission. And this foundation must not only mandate viable opportunities for competitive entry, but must provide a clear and comprehensive blueprint, as well as detailed requirements, for achieving such entry.

- Of critical importance to TRA and its resale carrier members in the short term is the availability from incumbent LECs of wholesale local telecommunications service offerings with margins adequate to support resale and with sufficient provisioning and other operational support. Of equal importance to TRA and its resale carrier members is the meaningful ability to acquire from incumbent LECs on an unbundled basis for just and reasonable rates all necessary (but no unnecessary) network elements and the right to provide local telecommunications service by recombining these unbundled network elements to create "virtual networks." In the longer term, the growth and development of a dynamic local resale industry will be dependent upon the deployment of alternative "physical" local exchange/exchange access networks.

- No exceptions should be recognized to the Section 251(c)(4) mandate that incumbent LECs "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." It can be anticipated that incumbent LECs will exploit each and every loophole afforded them in order to limit, or diminish the viability of local service resale. The Commission should be proactive in ensuring the availability of the operational support necessary to the realization of operationally viable local telecommunications resale.

- The Commission should provide the States with detailed guidance in computing "avoided costs" and wholesale rates, specifying not only key costing principals, but identifying specific USOA Accounts for inclusion in the cost calculus.

- Section 251(c)(3) provides an alternate means of providing competitive local telecommunications services without the immediate need to invest in "bricks and mortar". An entity electing to enter the local market in this manner differs from a traditional resale carrier in that such an entity will not be reselling "minutes" carried, or services provided, by an incumbent LEC. Rather, it will be operating a network, albeit a "virtual" rather than a "physical" network, and providing service on that network in much the same manner that the incumbent LEC provides service on its network. Among TRA's resale carrier members, there will be a large component that will engage in traditional "total service" resale, but a not insignificant number that will avail themselves of the opportunities provided by Section 251(c)(3) to create "virtual" local exchange/exchange access networks.

- The Commission should not impose unnecessary restrictions on the ability of competitive entrants to construct, or the services that may be provided via, "virtual" local telecommunications networks, and should ensure the availability of adequate operational support. The Commission should mandate a level of unbundling sufficient, without more, to fully implement the Congressional intent embodied in Section 251(c)(3), allowing the States the flexibility to impose additional unbundling requirements and reserving the flexibility to subject additional network elements to the Section 251(c)(3) unbundling requirement. Moreover, TRA agrees with the Commission that a presumption should arise from one LEC's unbundling of a particular network element that it is "technically feasible" for all other LECs with comparable networks to provide that same network element on an unbundled basis.

- Reflective of TRA's view that the costs that will serve as the foundation for the just and reasonable rates for access to unbundled network elements should be "forward looking," reflect the most efficient available technology and be predicated on long run incremental costs, TRA endorses the total service long run incremental ("TSLRIC") costing methodology for pricing unbundled network elements.

- TRA supports the manner in which the Commission proposes to implement the Section 251 interconnection and collocation mandates.

- TRA disagrees with the Commission's tentative conclusion that the Section 251(c)(2) interconnection obligations do not extend to telecommunications carriers requesting such interconnection for the purpose of originating or terminating interexchange traffic, but concurs with the Commission that carriers may request unbundled network elements for such purposes.

- No limitations, conditions or restrictions should be imposed on the availability to "any other requesting telecommunications carrier upon the same terms and conditions" of any "interconnection, service, or network element provided under an agreement approved under [Section 252]."

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The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.1415, hereby submits its Comments in response to the Notice of Proposed Rulemaking, FCC 96-182, released by the Commission in the captioned docket on April 19, 1996 (the "Notice"). In this rulemaking proceeding, the Commission will adopt rules that will codify the "pro-competitive, de-regulatory national policy framework"[1] embodied in the Telecommunications Act of 1996 ("'96 Act"),[2] focusing in particular on the implementation of the "local competition provisions" of the Communications Act of 1934, as amended by the '96 Act.[3] In so doing, the Commission will endeavor to establish a "new regulatory paradigm for telecommunications" that will both "open

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[1] S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess., p. 1 (Jan. 31, 1996) ("Joint Explanatory Statement").

[2] Pub. L. No. 104-104, 110 Stat. 56 (1996) ("'96 Act")

[3] 47 U.S.C. §§ 151, *et. seq* ("'34 Act").

monopoly telecommunications markets to competitive entry" by "removing legal and regulatory barriers to entry and reducing economic impediments to entry" and "promote competition in markets that already are open to new competitors."[4] As envisioned by the Commission, economic regulation will ultimately give way to "robust competition" within the new regulatory paradigm, creating an environment in which "a firm's prowess in satisfying consumer demand will determine its success or failure in the marketplace."[5]

TRA agrees with the Commission that a new regulatory paradigm is "essential to achieving Congress' policy goals." In these comments, TRA sets forth its views regarding the actions that will be required to supplant monopolies in local telecommunications markets with meaningful local exchange/exchange access competition, offering the Commission in so doing the insights gained by its membership in competing as small to mid-sized resale carriers in the interexchange and other telecommunications markets. TRA strongly urges the Commission to take an aggressive, proactive role in ensuring that the pro-competitive intent of the '96 Act is realized, adopting uniform, detailed national rules that will quickly secure for consumers the full benefit of competition, including lower rates, more diverse service offerings, enhanced service quality and increased technological innovation.

If the pro-competitive goals of the '96 Act are to be achieved, it is imperative, in TRA's view, that such national rules provide for the economically and operationally viable non-facilities-based provision of local telecommunications services (both by means of traditional "total

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[4] Notice, FCC 96-182 at ¶¶ 1, 2.

[5] Id. at ¶ 1.

service" resale of local service and through creation of "virtual networks" comprised of "network elements" acquired on an unbundled basis and recombined to achieve network functionality), as well as for deployment of alternative "physical networks" and, ultimately, full facilities-based competition.

I.

INTRODUCTION

TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect the interests of entities engaged in the resale of telecommunications services. TRA's more than 450 members are all engaged in the resale of interexchange, international, local exchange, wireless and/or other services and/or in the provision of products and services associated with such resale. Employing the transmission, and often the switching and other, capabilities of underlying facilities-based carriers, TRA's resale carrier members serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates otherwise available only to much larger users. TRA's resale carrier members also offer small and mid-sized commercial customers enhanced, value-added products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally reserved for large-volume corporate users.

While TRA's resale carrier members range from emerging, high-growth companies to well-established, publicly-traded corporations, the bulk of these entities are not yet a decade old. Nonetheless, TRA's resale carrier members collectively serve millions of residential and

commercial customers and generate annual revenues in the billions of dollars. The emergence and dramatic growth of TRA's resale carrier members over the past five to ten years have produced thousands of new jobs and new commercial opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based interexchange carriers by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped other small and mid-sized companies expand their businesses and generate new employment opportunities.

TRA's interest in this proceeding is in securing for its members and other small to mid-sized resale carriers economically and operationally viable opportunities to engage in the non-facilities-based provision of local telecommunications services, as well as in speeding the emergence and growth of the facilities-based local exchange/exchange access services competition that will be necessary to ensure the long-term success of local telecommunications resale and other forms of non-facilities-based local service provision. As TRA has often remarked in comments filed with the Commission, market forces are, all things being equal, generally superior to regulation in promoting the efficient provision of diverse and affordable telecommunications products and services. TRA is well aware, however, that the emergence, growth and development of a vibrant telecommunications resale industry is a direct product of a series of pro-competitive initiatives undertaken, and pro-competitive policies adopted, by the Commission over the past decade. TRA thus understands that the market is an effective regulator only if market forces are adequate to discipline the behavior of all market participants. If one or more

such participants retain vestiges of market power, regulatory intervention is essential to protect the public interest.

TRA, accordingly, urges the Commission to take any and all actions as shall be necessary to truly open the local exchange/exchange access market to competition, removing not only legal and regulatory entry barriers, but economic, technical, operational and other barriers to entry as well. To the extent necessary to end monopolies in the local telecommunications markets, TRA urges the Commission to be aggressively regulatory. Short term aggressive regulation will ultimately create a market environment which will allow for the pervasive relaxation and/or elimination of regulation. Nonspecific or incomplete regulatory directives will simply perpetuate the monopoly provision of local exchange/exchange access service, denying consumers the benefits of competitive sources of supply.

Monopolists relinquish power only if and when they are compelled to do so. Not only will monopolists not voluntarily permit competitive entry, but they will affirmatively resist such entry by "gaming" the system. And the more general the regulatory requirements and the greater the number of forums from which these requirements emanate and in which these requirements must be enforced, the easier it is for monopolist to delay the advent of competition. Hence, the best, and perhaps the only, way to achieve the pro-competitive intent of the '96 Act is for the Commission to adopt not only a uniform, pro-competitive national policy framework, but highly detailed implementing rules and regulations. Certainly, the States have a critical role to play in bringing competition to the local exchange/exchange access market, but the foundation must be laid by the Commission. And this foundation must not only mandate viable

opportunities for competitive entry, but must provide a clear and comprehensive blueprint, as well as detailed requirements, for achieving such entry.

Of critical importance to TRA and its resale carrier members in the short term is the availability from incumbent local exchange carriers ("incumbent LECs") of wholesale local telecommunications service offerings with margins adequate to support resale and with sufficient provisioning and other operational support. Of equal importance to TRA and its resale carrier members is the meaningful ability to acquire from incumbent LECs on an unbundled basis for just and reasonable rates all necessary (but no unnecessary) network elements and the right to provide local telecommunications service by recombining these unbundled network elements to create "virtual networks." In the longer term, the growth and development of a dynamic local resale industry will be dependent upon the deployment of alternative "physical" local exchange/exchange access networks. As noted above, detailed directives from the Commission are essential to achieve both of these ends.

II.

ARGUMENT

A. The Commission Should Promulgate Uniform, Detailed National Requirements To Achieve The Pro-competitive Intent Of The '96 Act (¶¶ 25 - 41)

The '96 Act directs the Commission to "establish regulations to implement the requirements of [Section 251 of the '96 Act]."[6] Section 251(d) provides the Commission with

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[6] 47 U.S.C. § 251(d).

some small measure of guidance in fulfilling this mandate. For example, Section 251(d) directs the Commission to consider the impact of including proprietary items among the network elements that should be made available for purposes of subsection (c)(3) and requires the Commission to refrain from precluding enforcement of certain State regulations, orders and policies that are consistent with, and which do not substantially prevent implementation of, the requirements of Section 251. Section 251(d) otherwise leaves to the Commission's discretion the manner in which the pro-competitive goals of the '96 Act should be achieved.

In short, it is up to the Commission to determine how best to structure a new regulatory paradigm which will quickly and effectively "open[] all telecommunications markets to competition."[7] TRA submits that in order to achieve this end, the Commission must assume a strong leadership role in designing and implementing a pro-competitive, ultimately de-regulatory policy framework. In this role, the Commission should establish rules, regulations and requirements that are sufficient unto themselves in scope and detail to fully implement the statutory mandate embodied in Section 251.[8] As noted above, this is not to suggest that the Commission should deny the States a role in ending monopolies in local telecommunications markets. Certainly, the States should be permitted to impose such additional requirements and safeguards on incumbent and other LECs as they shall deem necessary to protect consumers and

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[7] Joint Explanatory Statement at 1.

[8] In this respect, TRA disagrees with the view that it is sufficient to adopt rules which address only "those issues that are most critical to the successful development of competition." Notice, FCC 96-182 at ¶ 27. The proverbial "devil being in the detail," unless the implementing policies, rules and regulations promulgated by the Commission can essentially stand alone, LECs will be afforded an opportunity for delay in the individual State implementing and enforcement proceedings commenced to flesh out the necessary requirements.

promote competition The Commission's rules, however, should serve as a "floor" below which additional flexibility may not be afforded LECs.

The benefits attendant to promulgation of nationwide policies and uniform nationwide rules are manifest in light of what the Commission has correctly characterized as "the nationwide character of development and deployment of underlying telecommunications technology, and the nationwide nature of competitive markets and entry strategies in the dynamic telecommunications industry."[9] As the Commission itself has recognized, concrete national standards would speed competitive entry in those states which have not yet adopted rules governing local competition, as well as expedite the implementation of other provisions of the '96 Act that require application of the Section 251 policies, rules and requirements.[10] Explicit national rules would also ease the formidable task faced by entities planning competitive entry in multiple markets. Not only would it allow competitive local exchange carriers ("CLECs") to utilize common network designs across markets, thereby securing cost-efficiencies that would be denied them if a different network configuration were required in each market, but it would assist CLECs in raising capital by permitting them to develop fixed timetables for market entry and service provision and to forecast more accurately market penetration.[11] From an administrative perspective, uniform national requirements would, as recognized by the Commission, narrow the range of permissible negotiated results, thereby minimizing the incumbent LECs' bargaining

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[9] Notice, FCC 96-182 at ¶ 26.

[10] Id. at ¶¶ 28, 31.

[11] Id. at ¶ 30.

leverage, ensure that individual LEC/CLEC agreements did not establish unworkable precedents for later market entrants, and simplify and accelerate federal and state regulatory and judicial review, facilitating consistency among regulatory and judicial decisions.[12]

In the absence of detailed national rules, not only would the above benefits be lost, but the burden the '96 Act imposes on the States to expeditiously arbitrate and/or review interconnection agreements would be rendered far more difficult and time consuming. More critically, a lack of concrete national standards would afford incumbent LECs the opportunity to "game" the process in individual States, thereby delaying competitive entry into the local telecommunications market. As noted above, history teaches us that monopolists do not easily relinquish control of monopoly markets. Examples abound in the telecommunications industry of efforts by monopoly providers to resist competitive entry. One can look as far back as the reactions of American Telephone and Telegraph Company and the Bell System to the competitive challenges detailed in the Carterphone,[13] Hush-a-Phone[14] and Execunet[15] cases or as recently as the resistance of the Regional Bell Operating Companies ("RBOCs") and other incumbent LECs to Commission mandates to make available to competitive access providers ("CAPs") expanded

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[12] Id. at ¶¶ 31, 32. For all these reasons, TRA agrees with the Commission's tentative conclusion that it should "adopt a single set of standards with which both arbitrated agreements and BOC statements of generally available terms must comply." Id. at ¶ 36.

[13] Use of the Carterphone Device in Message Toll Telephone Service, 13 F.C.C.2d 430 (1968), *recon. denied* 14 F.C.C.2d 571 (1968).

[14] Hush-A-Phone Corp. v. United States, 238 F.2d 266 (D.C.Cir. 1956).

[15] MCI Telecommunications Corp. v. FCC, 561 F.2d 365 (D.C.Cir. 1977), cert. denied 434 U.S. 1040 (1978); MCI Telecommunications Corp. v. FCC, 580 F.2d 590 (D.C.Cir. 1978), cert. denied 439 U.S. 980 (1978).

interconnection opportunities[16] and State requirements to provide intrastate, intraLATA dialing parity.[17] The story, however, is always the same. Whether directed by the Commission, the Courts or the Congress, monopoly providers avail themselves of every conceivable opportunity to delay the advent of competition.

Unfortunately, reserving for individual State resolution all but the most critical issues associated with competitive entry into the local telecommunications market would hand the incumbent LECs a means to complicate and slow such entry by strategically manipulating the processes of individual States. Such manipulation could take the form of outright delay or conscious efforts to undermine CLEC network uniformity or a hundred other gambits. While such strategic manipulation would be detrimental to all market entrants, it would have a particularly powerful adverse impact on small to mid-sized competitors. Smaller players obviously cannot match the massive resources of the RBOCs and the large independent LECs. The larger the number of issues that must be debated in multiple forums, the more difficult it is for small to mid-sized carriers to enter multiple markets. And the public interest certainly would not be furthered by forcing small to mid-sized carriers to limit the number of markets in which they can provide service because they must dedicate resources to battling over the same issues in 50 plus different jurisdictions.

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[16] *See, e.g.,* Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, 10 FCC Rcd. 9637 (1995); Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport (Order Designating Issues for Investigation), 10 FCC Rcd. 11116 (1995).

[17] *See, e.g.,* "IntraLATA Dialing Parity on the Agendas of 21 Eastern States," State Telephone Regulation Report, Vol. 13, No. 20 (Oct. 5, 1995); "Wisconsin PSC Opens Door to Competition," RBOC Update, Vol. 6, No. 8 (August 1995).

TRA is not aware of "substantial state-specific variations in technological, geographic, or demographic conditions in particular markets that call for fundamentally different regulatory approaches."[18] Nor can TRA conceive of how the adoption of uniform national rules could threaten the "uninterrupted delivery of certain services" by incumbent LECs.[19] To the extent such matters exist, however, they are best dealt with by allowing individual States to petition for exemptions from the national structure in particular instances. Proposals to experiment with different pro-competitive regimes could be dealt with in a like manner. The national foundation should, however, be the norm and State variations, if any, should be the exception to the rule.

For many of the same reasons, TRA agrees with the Commission's tentative conclusion that its implementing regulations should apply to both the interstate and the intrastate aspects of interconnection, service and network elements.[20] First, Sections 251 and 252 of the '96 Act do not distinguish between such interstate and intrastate aspects and indeed, contemplate interrelated roles for both the Commission and the States in dealing with all elements of interconnection and interconnection arrangements.[21] In fact, these provisions obligate the Commission to assume the responsibility of and act for a State that declines to perform its functions and requires the States to apply the Commission's implementing rules. Second, the Congress clearly intended for the Commission to structure a "national policy framework" which

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[18] Notice, FCC 96-182 at ¶ 33.

[19] Id.

[20] Id. at ¶ 37.

[21] 47 U.S.C. § 251, 252.

encompassed competitive entry into all telecommunications markets.[22] And third, the Commission is correct the "[i]t would make little sense, in terms of economics, technology, or jurisdiction, to distinguish between interstate and intrastate components for purposes of sections 251 and 252."[23] While as noted above, there may be state-specific variations in technological, geographic, or demographic conditions in particular markets, these variations would be between markets, not between the interstate and intrastate components of service within a market.

TRA also agrees with the Commission that Section 2(b) of the '34 Act[24] does not require a contrary conclusion.[25] Well established rules of statutory construction confirm this view. First, it is well settled that specific statutory provisions prevail over more general provisions.[26] Second, it is equally well established that in the event of a conflict between two statutory provisions, the provision that was last in time or last in order of arrangement will prevail.[27] In this case, Sections 251 and 252 are more specific and enacted later than Section 2(b) and hence prevail over Section 2(b)'s general reservation of power to the States.[28]

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[22] Joint Explanatory Statement at 1.

[23] Notice, FCC 96-182 at ¶ 37.

[24] 47 U.S.C. § 152(b).

[25] Notice, FCC 96-182 at ¶ 39

[26] *See, e.g.,* FTC v. Manager, Retail Credit Co., Miami Beach Branch Office, 515 F.2d 988 (D.C.Cir. 1975); American Tel. & Tel. Co. v. FCC, 487 F.2d 865 (2d Cir. 1973).

[27] *See, e.g.,* Intercontinental Promotions, Inc. v. MacDonald, 367 F.2d 293 (4th Cir. 1966).

[28] Section 251 and 252 do not, however, limit the Commission's authority under Section 208 of the '34 Act, 47 U.S.C. § 208. Section 208 provides that "[a] person . . . complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention of the provisions thereof,"

[footnote continued on next page]

B. The Commission Should Ensure The Availability Of Economically And Operationally Viable Opportunities For Traditional "Total Service" Resale Of Local Telecommunications Services (¶¶ 172 - 194)

1. The Commission's Pro-competitive Resale Policies Have Generated "Numerous Public Benefits"

As the Commission has repeatedly acknowledged, resale of telecommunications services generates "numerous public benefits," among which are the downward pressure resale exerts on rates and the enhancements resale produces in the diversity and quality of product and service offerings:[29]

> Chief among the public benefits from unlimited resale is the incentive provided to carriers to offer services at rates that more closely reflect the underlying cost of providing the service. If a carrier's communications services and facilities can be resold, it is more likely to price them closer to costs. Further, because unrestricted resale and sharing of communications services will increase the number of parties offering the same types of services, undue discrimination in the marketplace is less likely to occur. Thus, the resale mechanism furthers the objectives of Sections 201(b) and 202(a) of the Act.[30]

[footnote continued from previous page]

may seek redress from the Commission. This entitlement clearly applies to violations of all provisions of the Act, including Sections 251 and 252, and nothing in the '96 Act suggests otherwise. With respect to the effectiveness of the complaint process, TRA directs the Commission to comments it filed in PP Docket No. 96-17, Improving Commission Processes, which address this very point. As to other forums, TRA urges the Commission to support complainants 'efforts to enforce Commission rules brought in U.S. District Court under Section 401(b) of the '34 Act, 47 U.S.C. § 401(b).

[29] AT&T Communications: Apparent Liability for Forfeiture and Order to Show Cause, 10 FCC Rcd. 1664, ¶12 (1995), *pet. for rev. pending* AT&T Corp. v. FCC, Case No. 95-1339 (filed July 5, 1995) ("AT&T Forfeiture Order") (*citing* Resale and Shared Use of Common Carrier Services, 60 F.C.C.2d 261 (1976) ("Resale and Shared Use Order"), *recon.* 62 F.C.C.2d 588 (1977), *aff'd sub nom.* American Tel. & Tel. Co. v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied,* 439 U.S. 875 (1978); Resale and Shared Use of Common Carrier Services, 83 F.C.C.2d 167 (1980), *recon.* 86 F.C.C.2d 820 (1981)); *see also* U S West Tariff Nos. 3 and 5, 10 FCC Rcd. 13708, ¶11 (1995) (*citing* the Resale and Shared Use Order and the AT&T Forfeiture Order).

[30] AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶ 12.

Emphasizing this view, the Commission noted, in concluding that wireless resale had the "overall effect of promoting competition," that resale provides "a means of policing price discrimination," "some degree of secondary market competition," and "a source of marketplace innovation."[31]

The lower prices and service enhancements that resale generates redound primarily to the benefit of lower volume users. As discussed earlier, TRA's resale carrier members serve generally small and mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates and enhanced, value-added products and services and personalized customer support functions which are generally not provided to smaller users.

To obtain and preserve these public benefits for consumers, the Commission long ago adopted, and continues to enforce, policies which require that "all common carriers . . . permit unlimited resale of their services."[32] To this end, the Commission affirmatively deems unjust and unreasonable, and prohibits restrictions on, resale.[33] Indeed, the Commission has declared that any "[a]ctions taken by a carrier that effectively obstruct the Commission's resale requirements are inherently suspect."[34]

The Commission's resale policies have produced their intended effect. The resale sector has long been the fastest growing segment of the long distance industry.[35] Resale of

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[31] Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services (Second Notice of Proposed Rulemaking), 10 FCC Rcd. 10666, ¶ 84 (1995).

[32] AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶2.

[33] Resale and Shared Use Order, 60 F.C.C.2d 261 at 298-99.

[34] AT&T Forfeiture Order, 10 FCC Rcd. 1664 at ¶13.

[35] Long Distance Market Shares (Fourth Quarter 1995), Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Table 6 (March 1996).

international telecommunications services is exploding.[36] Wireless resale, including resale of cellular telephone and paging services, continues to expand.[37] And resale carriers are already entering the local exchange/exchange access market now that the '96 Act has eliminated legal barriers to entry.[38]

As noted above, the bulk of TRA's resale carrier members are small to mid-sized businesses serving other small to mid-sized businesses. Congress is currently looking to small business to create jobs and stimulate economic growth; indeed, Section 257 of the '96 Act provides for Commission identification and elimination of "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services or in the provision of parts or services to providers of telecommunications services and information services."[39] Traditional "total service" resale is the most likely means by which small and mid-sized businesses will enter the local telecommunications market. But

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[36] Trends in the International Telecommunications Industry, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, p. 37 (June 1995). *See* VIA USA, Ltd., 9 FCC Rcd. 2288, ¶ 11 (1994), *aff'd* 10 FCC Rcd. 9540 (1995) ("The Commission has long recognized that increased competition in the international marketplace benefits U.S. ratepayers, and has routinely granted applications for Section 214 authorizations for the resale of international switched voice service to further that goal.").

[37] "From a Resale Point of View," Mobile Phone News, Vol. 14, No. 1 (Jan. 1, 1996); "MCI Buys SHL Systemhouse; Closes Nationwide Purchase," Communications Today (Sept. 20, 1995).

[38] 47 U.S.C. § 253.

[39] 47 U.S.C. § 257.

they will only do so if there are economically and operationally viable opportunities for such resale.[40]

2. The Commission Should Ensure The Availability Of Operationally Viable Traditional "Total Service" Resale Opportunities (¶¶ 172 -177)

Section 251(c)(4) of the '96 Act requires incumbent LECs to "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[41] Indeed, Section 251(c)(4), with one exception, makes unlawful any prohibition of, or the imposition of any unreasonable or discriminatory condition or limitation on, the resale of such telecommunications service by an incumbent LEC. The sole exception recognized by Section 251(c)(4) to this otherwise pervasive resale requirement is the ability of a State to prohibit a resale carrier from offering to a category of subscribers a service obtained at wholesale rates which is not provided at retail by the incumbent LEC to that category of subscribers.

The Commission requests comment on "what limitations, if any, incumbent LECs should be allowed to impose with respect to services offered for resale under Section 251(c)(4)"

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[40] Of course, small and mid-sized carriers will not be the only entities to engage in the traditional "total service" resale of local telecommunications services. Entities intent on constructing alternative "physical" local exchange/exchange access networks, or portions thereof, will undoubtedly avail themselves in the short-term of the ability to engage in "total service" resale. The benefits of such an approach for such entities are manifest. Traditional "total service" resale permits such entities to establish a presence in the market and secure customers while network facilities are being constructed. And it permits such entities to roll out their networks on a manageable schedule, allowing for investment, as well as construction, lags.

[41] 47 U.S.C. § 251(c)(4). TRA agrees with the Commission that the sole distinction between the Section 251(c)(4) resale requirement and the Section 251(b)(1) resale requirement is that the latter is not subject to explicit pricing guidelines.

and tentatively concludes "that the range of permissible restrictions should be quite narrow."[42] In particular, the Commission queries whether "the resale obligation under Section 251(c)(4) extends to an incumbent LEC's discounted and promotional offerings" and if so how these offerings should be priced at wholesale and what, if any restrictions should apply?[43] Moreover, the Commission asks whether an LEC should be permitted to avoid making a service available for resale by "withdrawing the service from its retail offerings?"[44] Finally, the Commission questions whether the incumbent LEC should bear the burden of proving that a restriction on resale is not unreasonable or discriminatory?[45]

The short and simple answer is that incumbent LECs will exploit each and every loophole afforded them to limit, or diminish the viability of, local service resale. At least initially, every customer secured by a resale carrier will be a customer lost by the incumbent LEC. The incentives to hinder resale in such a circumstance are obvious. Hence, no loopholes should be provided. Section 251(c)(4) is clear on its face -- incumbent LECs are required to offer for resale at wholesale rates each and every telecommunications service that the carriers provide at retail to subscribers who are not telecommunications carriers. No exceptions are recognized and none should be allowed by the Commission.[46]

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[42] Notice, FCC 96-182 at ¶ 175

[43] Id.

[44] Id.

[45] Id.

[46] The sole exception to this principal should be a limitation on the resale of residential service which receives explicit universal service support to other than the intended recipients of that support.

"Each and every telecommunications service provided at retail to subscribers" clearly includes discounted and promotional offerings, as well as such like offerings as optional calling plans, special pricing plans, volume and term plans and bundled offerings. "Each and every telecommunications service provided at retail to subscribers" also includes nonregulated as well as regulated services, tariffed as well as non-tariffed services and ancillary services so long as they are part and parcel of a "telecommunications service provided at retail to subscribers."[47] And even if the Commission had discretion to read any of these offerings out of the resale requirement -- which it does not[48] -- it should not do so. If, for example, an exception for promotional and discounted offerings were recognized, the number and variety of discounted and promotional offerings would proliferate and soon be the only viable retail offerings of incumbent LECs. Likewise, if an incumbent LEC could avoid its resale obligations by simple removing a service from its list of retail offerings or by bundling the service with other products

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[47] Thus, for example, services made available for local service resale should include, among others, such ancillary services as Caller ID and other custom local area signaling service ("CLASS") features, calling card, directory assistance, operator services, call blocking services, voice messaging and video dialtone, as well as all more standard services such as ISDN, Centrex, intraLATA toll, foreign exchange service and trunk services (including flat-rated and measured). Services incidental to these and other services, such as billing and various database and signalling functions, should also be included.

[48] 47 U.S.C. § 160(d) ("the Commission may not forbear from applying the requirements of Section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.").

or services, it would most certainly seek to categorize its preferred services as other than retail offerings or bundle them with products and services a resale carrier could not or would not take.[49]

The Commission should not "hide its head in the proverbial sand" and ignore the highly predictable behavior of monopolists facing competitive entry. Thus, in addition to applying the resale requirements to all retail services, wholesale rates must be based on the rates actually charged by the incumbent LEC, whether retail, promotional or discounted, minus avoided costs, or wholesale rates will become a meaningless concept, as promotional and discount prices become the effective retail rates. And resale carriers should not be required to take promotional or discounted services pursuant to the same restrictions that apply to the incumbent LECs' retail customers or restrictions which have the practical effect of rendering a service unavailable for resale will be associated with virtually every attractive promotional or discount offering.[50]

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[49] To minimize these problems, all services offered by incumbent LECs on a bundled basis should be made available on an unbundled basis at a cost reflective of their proportionate share of the bundled price and no service withdrawn from an incumbent LEC's retail offering should be provided thereafter to any customer, including customers who had been using the service before its withdrawal. Certainly, it is not enough to justify the withdrawal of a service from a retail offering to, as the Notice (¶ 175) suggests, demonstrate that "competitors will have an alternative way of providing the service." Such a standard represents an open invitation to strategic manipulation of service offerings and pricing.

[50] In the interexchange market, facilities-based carriers have employed, and continue to employ, a number of stratagems to render particular service offerings effectively unavailable for resale. One common approach is to limit the manner in which a service offering may be used. Thus, for example, a limitation on the number of locations a service offering may serve renders that offering unavailable for resale. Obviously, a service offering which can only be utilized at twenty, or fifty, or even a hundred locations cannot be broadly resold. Capping discounts at a specified revenue level and thereafter charging a higher price has a like effect. If, for example, only the first hundred thousand minutes are discounted, the service offering will not be usable to serve a large number of entities. Similarly, limiting the percentage of switched, versus dedicated, access will generally prevent resale of an interexchange service offering, given that the preponderance of resale customers are small to mid-sized businesses which do not generate traffic volumes that justify use of dedicated access.

[footnote continued on next page]

Finally, in the virtually inconceivable situation in which a service might be exempted from the resale requirement imposed on incumbent LECs, the incumbent LEC seeking the exemption should not only bear the burden of proving that any resultant resale restriction is reasonable and nondiscriminatory, but the burden of proof should be extremely high.

Merely requiring that services be made available for resale is not enough to ensure the availability of operationally viable resale opportunities. The manner in which services are provided is also a critical component. Viable resale requires efficient and reliable processing of service orders, the timely delivery of complete and accurate billing tapes and the ready

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[footnote continued from preceding page]

Another approach employed in the interexchange market is to erect obstacles to obtaining service which resale carriers generally cannot overcome. The Commission, for example, has sanctioned AT&T for conditioning the availability of Virtual Telecommunications Network Service Options on the submission of detailed location and network design information which resale carriers, because of the nature of their business, simply cannot provide. As the Commission explained:

> We also find that AT&T's insistence on the detailed advanced information at issue constitutes an unreasonable restriction on resale in violation of our resale orders and requirements, as specifically made applicable to Tariff 12 options by our Tariff 12 Orders. . . [T]he advance requirements pose substantial burdens on resale customers . . . because they often do not have and, therefore, cannot provide all the network design information in advance due to the nature of their operations. We have carefully considered AT&T's rationale for its advance information requirements but find no valid business purpose for the requirements, as applied to resale or non-resale customers, that would justify the substantial burdens this practice imposes. Requirements such as those at issue here have the effect of discouraging resale, thus undermining our pro-competitive policies enunciated in our resale orders.

Other barriers are equally effective at preventing resale carriers from obtaining interexchange service offerings. For example, deposit requirements which are tied to the percentage of a customer's annualized commitment that will be generated initially or shortly after initiation of service adversely impact resale carriers alone because unlike other corporate users, resale carriers "ramp-up" usage over the course of their service terms. Ordering procedures which require resale carriers to disclose competitively-sensitive information before a service order is accepted or approved similarly deter resale carriers from seeking particular service offerings.